No. 88-1942

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1988

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SUPREME COURT, U.S.

UNITED STATES OF AMERICA,

PETITIONER

V.

MARIO BERNAL,

RESPONDENT

On Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN FORMA PAUPERIS

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit applies a harmless error analysis in reviewing challenges to guilty pleas entered under Fed. R. Civ. P. 11.

2. Whether the United States Court of Appeals for the Fifth Circuit properly reversed Appellant's conviction when the District Court totally failed to comply with Fed. R. Crim. P. 11(c)(1)'s requirement that the Court personally address the defendant, inform him of, and determine that he understands the nature of the offense, and committed other harmful errors.

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No. 88-1492

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1988

UNITED STATES OF AMERICA,

PETITIONER

V.

MARIO BERNAL,

RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent Mario Bernal, proceeding in forma pauperis, respectfully files this Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit that the Solicitor General, on behalf of the United States of America, has filed to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

I.

REPLY TO PETITIONER'S STATEMENT OF THE CASE

On August 2, 1987, Drug Enforcement Agency personnel arrested Respondent Bernal, and Miguel Dimas immediately after they allegedly delivered approximately one kilogram of cocaine to Ramona Tapia, a government undercover agent. (Plea Agreement of October 9, 1987. Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (the "Petition") at 13a.) Hal D. Wallace, Jr. entered his appearance as retained counsel for Respondent Bernal on August 6, 1987. The United States District Court for the Northern District of Texas, Dallas Division arraigned Respondent Bernal on August 28, 1987, and he entered a plea of not guilty. At a rearraignment hearing on October 9, 1987, Respondent Bernal proposed to change his plea pursuant to a negotiated plea agreement.[1] At that time, the District Court did not read the indictment to Respondent Bernal. After prompting by the District Court, Mr. Bernal made the unsworn statement that he did not desire to have the indictment read. (Petition at 17a - 18a.) The District Court then administered an oath and asked a number of questions concerning Respondent's desire to plead guilty, and his understanding of the plea's consequences pursuant to Fed. R. Crim. P. 11.

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[1] As detailed later all involved parties including the Court misapprehended the appropriate range of punishment because they failed to realize that the statutory amendment increasing the range of punishment had not taken effect. That error independently tainted the entire Rule 11 proceeding. See Section II B, infra.

Respondent Bernal stated he gave up the right to have the plea agreement itself read in open court. (Petition at 22a.) He also stated that there were no corrections to the factual resume, the plea agreement, or the elements of the offense. (Id. at 22a.) During this interchange, the Court gave erroneous advice on the range of punishment. At the conclusion of the Rule 11 examination, Respondent Bernal pled guilty to Count IV of the indictment. The Court deferred acceptance of the plea agreement pending consideration of the presentence report, and set sentencing for November 20, 1987. Respondent Bernal, and his lawyer then did make two nonsubstantive changes to the factual resume without government objection. (Id. 14a - 15a, 25a - 26a.)

By order filed November 17, 1987, the District Court accepted the guilty plea to Count IV, and reaffirmed the November 20, 1987 setting. The Court noted 18 U.S.C. §3552(d)'s effective date of November 1, 1987, and its provision for a ten day review period. Respondent Bernal, and his retained counsel signed and filed a waiver of the ten day examination period. The Court then proceeded with the sentencing hearing on November 20, 1987. Assuming that the statutory amendment increasing the range of punishment for the offense charged in Count IV applied, it imposed a 12 year nonparolable sentence, and dismissed Counts I, II, and III of the indictment.

On November 25, 1988, the United States Court of Appeals for the Fifth Circuit reversed Respondent's conviction and remanded the case to the District Court for a new plea, or further proceedings. (Petition at 1a) United States v. Bernal, 861 F.2d

434 (5th Cir. 1988). (Petition at 1a) On January 18, 1989, United States filed a Petition for Rehearing, and a separate suggestion for rehearing en banc. On April 4, 1989, the Court of Appeals denied the government's petition for rehearing, and suggestion for rehearing en banc. United States v. Bernal, 871 F.2d 490 (5th Cir. 1989). (Petition at 11a)

II.

ARGUMENT

A. THE FIFTH COURT DOES APPLY A PROPER HARMLESS ERROR ANALYSIS IN REVIEWING CHALLENGES TO GUILTY PLEAS ENTERED UNDER FED. R. CRIM. P. 11.

The Government incorrectly asserts that the Fifth Circuit applies an improper "automatic reversal" standard when reviewing challenges to guilty pleas under Fed. R. Crim. P. 11. It argues that the standard of review enunciated in United States v. Dayton, 604 F.2d 931 (5th Cir. 1979)(en banc), cert. denied, 445 U.S. 904 (1980) as reaffirmed in United States v. Corbett, 742 F.2d 173 (5th Cir. 1984) fails to give effect to the 1983 amendment that added a harmless error subsection to Fed. F. Crim. P. 11.

The Government in fact misanalyzes the Fifth Circuit's analytical framework as established in Dayton, and incorrectly asserts that it conflicts with the approach in other circuits. In Corbett the Fifth Circuit specifically considered the effect of the 1983 addition of subsection (h) and concluded that under Dayton the Fifth Circuit was already following a harmless error analysis in direct appeals asserting Rule 11 violations. The Corbett court stated "We are convinced, however, that the addition of section (h) comports with our prior practice." 742 F.2d at 179, n. 14. The Fifth Circuit here noted this precedent and correctly proceeded to follow and apply Dayton, Corbett, and Fed. R. Crim. P. 11. 861 F.2d at 436-37. (Petition at 4a-6a)

The Government seizes upon one paragraph of the Fifth Circuit's opinion to argue that the rule enunciated in Dayton, and reaffirmed

in Corbett, is contrary to the practice in other circuits. The opening sentence of that paragraph does state: "Other circuits have interpreted the effect of Subsection (h) differently." 861 F.2d at 436. (Petition at 5a) In the review that follows, however, the opinion fails to identify any conflict between Dayton and the cited cases from other circuits. The cited opinions from other circuits that reference Fifth Circuit cases all interpret the Fifth Circuit approach as a "harmless error" analysis. See United States v. Theron, 869 F.2d 477, 479-80 n. 3, 4 (10th Cir. 1988); United States v. Lovett 844 F.2d 487, 492 (7th Cir. 1988); Lilly v. United States, 792 F.2d 1541, 1545-46 (11th Cir. 1986). Shepardization of the Dayton and Corbett opinion reveals that no other circuit has explicitly criticized or refused to follow the Dayton and Corbett approach.

The Government asserts that the Eleventh Circuit also follows Dayton and refuses to apply the harmless error analysis for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. (Petition at 11-12) Yet it cites United States v. Bell, 776 F.2d 965 (11th Cir. 1985), cert. denied, 477 U.S. 904 (1986) in a footnote and concedes that the Eleventh Circuit did find the error in question harmless. (Petition at 12 n. 6)

The Bell opinion reflects a much more extensive record that exists here. There, the Government presented a detailed, on the record, factual recitation of the basis for the charge in Bell's presence. 776 F.2d at 969-70. The opinion further notes:

> Thereafter, in commenting upon Agent Collins' recitation of the facts, Bell's attorney stated:

> I believe that recitation is exactly what the Government would offer as proof in this case, that it would support a conviction for conspiracy to import marijuana and a conviction for conspiracy to possess marijuana with the intent to distribute it, and we have no evidence to offer contrary to the proper testimony by the Government.
>
> The district court then accepted Bell's guilty plea.

776 F.2d at 970.

The Advisory Committee note to Fed. R. Crim. P. 11 actually confirms the continued validity of the Fifth Circuit's Dayton analysis. The 1983 amendment note on prior practice discusses a conflict among the circuits over the validity of "harmless error" analysis on direct appeals asserting Rule 11 violations. The Advisory Committee note cites United States v. Journet, 544 F.2d 633 (2nd Cir. 1976), and United States v. Boone, 543 F.2d 1090 (4th Cir. 1976) as examples of decisions rejecting the harmless error concept in direct Rule 11 appeals. It then states:

> On the other hand, decisions are to be found taking a harmless error approach on direct appeal where it appeared the nature and extent of the deviation from Rule 11 was such that it could not have had any impact on the defendant's decision to plead or the fairness in now holding him to his plea.

See 18 U.S.C.A. Vol. 13 at 361. To support that statement, the Advisory Committee then specifically cites the Fifth Circuit decision in United States v. Coronado, 554 F.2d 166 (5th Cir.), cert. denied, 454 U.S. 870 (1977) (affirming a guilty plea conviction despite the district court's failure personally to explain the charges because the transcript affirmatively

demonstrated sufficient explication). The later Dayton decision reaffirmed the standard the Coronado court applied. Thus, contrary to the Government's assertions, the addition of Subsection (h) in the 1983 Amendment to Fed. R. Crim. P. 11 was intended to affirm, not reject, the Dayton approach.

The Advisory Committee note on the 1983 Amendment further states:

> Although all of the aforementioned considerations support the policy expressed in new subdivision (h), the Advisory Committee does wish to emphasize two important cautionary notes. The first is that subdivision (h) should not be read as supporting extreme or speculative harmless error claims or as, in effect, nullifying important Rule 11 safeguards. There would not be harmless error under subdivision (h) where, for example, as in McCarthy there had been absolutely no inquiry by the judge into defendant's understanding the nature of the charge and the harmless error claim of the Government rests upon nothing more than the assertion that it may be "assumed" defendant possessed such understanding merely because he expressed the desire to plead guilty.

18 U.S.C.A. Vol. 13 at 363. Thus, the Advisory Committee expressly adopted the Dayton analysis that a total failure to address a core concern of Rule 11 is harmful. That is not a rejection of harmless error analysis, but a proper application of it.

The Advisory Committee went on to say:

> Indeed, it is fair to say that the kinds of Rule 11 violations which might be found to constitute harmless error upon direct appeal are fairly limited, as in such instances the matter "must be resolved solely on the basis of the Rule 11 transcript" and the other portions (e.g., sentencing hearing) of the limited record made in such cases. United States v. Coronado, supra. Illustrative are: where the judge's compliance with subdivision (c)(1) was not absolutely complete, in that

> some essential element of the crime was not mentioned, but the defendant's responses clearly indicate his awareness of that element . . .

Id. Again, this is illustrative of the situation where the trial judge inadequately addresses a core concern, but no harm occurs. The substance of the Advisory Committee's analysis is identical to the Dayton standard.

In Section II of its opinion, the Fifth Circuit carefully and correctly defined the applicable standard of review set forth in United States v. Dayton, 604 F.2d 931 (5th Cir.)(en banc), cert. denied, 445 U.S. 904 (1974). The Government argues strenuously that the Fifth Circuit follows an inflexible and artificial standard. The actual opinion below belies that implication. So does the text of the Dayton opinion. The Government has manufactured an illusory conflict among the circuits to justify review in this court, when its true complaint is over the application of the correct standard to the specific case.

B. THE FIFTH CIRCUIT PROPERLY REVERSED RESPONDENT'S CONVICTION BECAUSE THE DISTRICT COURT TOTALLY FAILED TO COMPLY WITH FED. R. CRIM. P. 11 (c)(1), AND COMMITTED OTHER HARMFUL ERRORS.

Not only did the Fifth Circuit articulate the correct test, it correctly applied it to the facts of this case. The court below noted the express language of Fed. R. Crim. P. 11(c)(1) that specifically requires that: "Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands . . . the nature of the charge to which the plea is offered ...." Fed. R. Crim. P. 11(c)(1) (emphasis supplied).

The Fifth Circuit correctly held that the appellate record is entirely devoid of any evidence that the trial court did so in this case, and devoid of any record evidence that the equivalent advice was provided. It is undisputed that the trial court did not read the indictment or the plea agreement to Respondent Bernal. In fact, the trial court prompted Respondent to waive reading of the indictment, and accepted his waiver of the reading of the plea agreement. Merely reading the indictment and asking whether the defendant has discussed the charge with his attorney is insufficient. Majko v. United States, 457 F.2d 790 (7th Cir. 1972). See also, United States v. Punch, 709 F.2d 889 (5th Cir. 1983). Suggesting waiver of a reading of the indictment, and asking about discussions with an attorney then recently arrested and now suspended from the practice of law for drug violations is totally inadequate.[2]

The Fifth Circuit carefully reviewed the record and concluded: "In the exchange between the district court and Bernal, there was not even a cursory reference to the type of offense or the nature of the charges to which Bernal sought to enter a plea." 861 F.2d at 437. (Petition at 2a). The above errors in the Rule 11 proceeding are clearly sufficient to require reversal.

In this case, however, the record reflects additional harmful errors. After implicitly coercing Respondent Bernal to waive the

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[2]The 199th Judicial District court of Collin County, Texas recently suspended Respondent's retained counsel from the practice of law pending his appeal from his conviction of unlawful possession with intent to deliver cocaine. He was arrested on that charge shortly before Respondent's sentencing hearing. 1988 Tex. B. J. 1139-40.

reading of the indictment, and failing to deliver any advice as to the nature of the charge, the court then erroneously informed Bernal that the maximum period of "supervised release" was four years, instead of life. See United States v. Molina-Uribe, 853 F.2d 1193 (5th Cir. 1988)(reversing a guilty plea conviction for the trial judge's failure to advise the defendant of the maximum possible post-incarceration special parole period). Further, the court gave only a cursory and inadequate explanation of the term "supervised release".

The Government relies upon speculation, rather than record evidence, in arguing that Respondent's presumed ability to read and absorb the information contained in the plea agreement excuses the District Court's admitted error. The fact that Respondent's counsel changed an "and" to an "or" in the plea agreement is just as consistent with substantive ignorance as with comprehension. At no time did anyone read any portion of the indictment or the factual resume, or make any specific statements concerning the nature and elements of the offense charged in Respondent's presence.

More significantly the District Court, and the parties negotiating the plea agreement, totally misapprehended the applicable penalty provisions. The section amending 21 U.S.C. § 841 that increased the penalty for the offense charged in Count IV is only effective for offenses committed after November 1, 1987. See United States v. De Los Reyes, 842 F.2d 755 (5th Cir. 1988); United States v. Byrd, 837 F.2d 179 (5th Cir. 1988). Thus, Respondent's retained counsel, the United States Attorney, and the

District Court at the Rule 11 hearing affirmatively misled Respondent Bernal concerning the potential punishments, and exaggerated the benefits of the plea agreement. In Kennedy v. Maggio, 725 F.2d 269 (5th Cir. 1984), the Fifth Circuit aptly stated: "It is elementary that a plea entered in reliance on defendant's attorney's patently erroneous statement of the law in relation to the facts cannot be voluntary due to the attorney's ineffectiveness." 725 F.2d at 273. Where the District Court, and the Government affirmatively contributed to Respondent's fundamental misunderstanding, the situation is even more egregious. That error alone compels reversal.

The Government has totally failed to demonstrate that the Fifth Circuit applies a different standard of review than any other circuit, or that the Fifth Circuit "has so far departed from the accepted and usual course of judicial proceedings... as to call for an exercise of this Court's power of supervision." See U.S. Sup. Ct. R. 17.1(a). Undoubtedly federal courts dispose a very high percentage of a very large number of criminal cases through guilty pleas under Fed. R. Civ. P. 11. The paucity of citations in the Government's Petition to Fifth Circuit guilty plea reversals graphically demonstrates that in almost ten years of application the Fifth Circuit has not used Dayton to reverse an inordinate number of guilty plea convictions. The Government's true quarrel is with the Fifth Circuit's analysis of the record, and its speculation that if the District Court had asked the right questions, it would have received the right answers.

III.

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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Mr. Joseph Spaniol
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Re: United States of America v. Mario Bernal
Cause No. 88-1942

Dear Mr. Spaniol:

Enclosed are eleven copies of Respondent's Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, eleven copies of Respondent's Motion for Leave to Proceed in Forma Pauperis and a Certificate of Service in the above referenced matter. Please have one copy of the Brief and one copy of the Motion file stamped and return those copies to me for our files.

Please let me know if I can provide any further information.

Yours truly,

George Lucas Ashley

George Lucas Ashley

GLA:lb
Enclosures
cc: Mr. Kenneth Starr
Mr. Andrew Levchuk
Mr. Matt Orwig
Mr. Mario Bernal
Mrs. Hilda Bernal

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CERTIFICATE OF SERVICE

I, George Lucas Ashley, member of the Bar of this Court hereby certify that on this 25th day of August, 1989, one copy of Respondent's Brief in Opposition to the Petition of Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed first class postage prepaid, to Kenneth W. Starr, Solicitor General, Department of Justice, Washington D.C. 20530, Counsel of Record for Petitioner herein. I further certify that all parties required to be served have been served.

George Lucas Ashley

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